

Editorial: How to judge Judge Gorsuch

Neil M. Gorsuch, a highly regarded conservative jurist best known for upholding religious liberty rights in the legal battles over Obamacare, is President Trump's Supreme Court nominee.

By **Editorial Board**

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"I *t is the role of judges to apply, not alter, the work of the people's representatives. A judge who likes every outcome he reaches is very likely a bad judge — stretching for results he prefers rather than those the law demands."*

— *Judge Neil Gorsuch after his nomination Tuesday to the [U.S. Supreme Court](#)*

A U.S. president selects a distinguished judge to join the Supreme Court. If you've followed these nominations in the 30 years since the demonizing of [Robert Bork](#), you know what comes next:

The nominee becomes a chew toy. Senators of the opposition party, stoked by interest groups they serve and protect, say he or she is a troubling choice, out of the American mainstream. They annotate flaws, indiscretions and the chew toy's writings with which they disagree.

Members of both major parties play this sorry game. President Trump's nomination of federal appellate Judge Neil Gorsuch of Colorado is no different. Moments after Gorsuch's brief and humble remarks to the nation

Tuesday night, Sen. Ben Sasse, R-Neb., quipped that [Senate](#) Democratic leader [Chuck Schumer](#) "is about to tell Americans that Judge Gorsuch kicks puppies and heckles piano recitals." Schumer promptly declared his "serious doubts" about whether Gorsuch should be confirmed. Schumer also said it's up to Gorsuch to prove that he's in, yes, the American mainstream.

Wrong. Gorsuch doesn't have to prove anything his stellar record has established. It's up to Schumer and his colleagues to vet Gorsuch, preferably with open minds, and decide whether he'd be a good justice. The process includes hearings notorious for long-windedness from preening senators. Example: In 2005, during the questioning of nominee [John Roberts](#), Sen. Joe Biden warned Roberts to give "short answers," then filibustered for 11 hours. At Roberts' confirmation hearing, Biden deployed theatrics that The Washington Post described as "a performance of self-loathing." Biden took his head, put his face in his hand, pouted and

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There's a much better way for senators to provide their advice and consent. First, a word about the Gorsuch nomination:

It comes as Democrats are justifiably furious about the shabby treatment that, in 2016, Republican senators gave to President [Barack Obama](#)'s nominee to fill the seat of the late Justice [Antonin Scalia](#). Obama sought to fill what had been a conservative seat with a liberal jurist, Chicago-area native Merrick Garland.

We strongly urged, as is our custom, that the Senate evaluate Garland's exemplary record and "Vote him up or down, but vote." Republicans stonewalled, disingenuously claiming that Obama, so late in his presidency, should leave the nomination to the next president.

Republicans said they were merely following the dictate of, again, Biden: In 1992, with a Republican president and a Democratic Senate, Judiciary Chairman Biden said that "once the political season is underway, and it is, action on a Supreme Court nomination must be put off until after the election campaign is over. That is what is fair to the nominee and essential to the process."

The Gorsuch pick offers both parties a chance to end these selfish antics. Early reviews suggest he's fair-minded, brilliant, collegial — and the sort of conservative Trump told voters he'd nominate. New York University law professor Richard Epstein, who disagrees with Gorsuch on some issues, on Wednesday gave us his verdict: "He is all around a terrific guy, and if he is out of the mainstream then no Republican appointee to the bench is within it. Nor is he like Scalia in temperament. He thinks first, then writes, does not have any strong intellectual crusades on anything from standing to abortion to gay rights."

Critics say Gorsuch defers to corporations and scorns government regulation. Those are areas senators should explore. The rest of us should ask whether the critics fault Gorsuch's application of laws, or merely dislike the outcomes of the cases. It is fair to ask whether his rulings reflect the Constitution or his own beliefs. Democrats can draw a question from an episode involving Scalia, whom Gorsuch admires:

In 1989, Scalia cast a deciding vote to uphold flag burning in Texas. A year later he opposed a federal law against flag burning. His votes, he said, upheld constitutional free speech — yet violated *his* principles: "If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I am not king."

Nor are U.S. senators, whose convictions shouldn't be the chief issue in any confirmation process. Yet in hearings, senators tend to ask show-off, hot-button questions that they know nominees are too smart, and too ethical, to answer candidly. A wordy question essentially asking if a nominee agrees with the 1973 decision in *Roe v. Wade* elicits an earnest but vague nonresponse; the future justice likely will hear abortion cases, and doesn't want to suggest bias.

We'd urge less attention in hearings to previous court decisions and more focus on how a nominee views key passages in the Constitution. What does this amendment mean to your jurisprudence? How, if at all, would you recast it? Does it conflict with such-and-such in the Bill of Rights? In short, explore how a nominee thinks rather than playing gotcha over how he or she may vote in future cases. Judging isn't legislating. It's about, well, *judgment*.

Maybe vetting will unearth reasons why senators should reject Gorsuch. Any conclusion should emerge from a fair, efficient process, not from reflexive reactions driven by senators' — and their pet interest groups' — politics. Then:

Vote him up or down, but vote.

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